

## FACTORS FAVORING TRANSFER OF KUWAITI DETAINEES TO THE CUSTODY OF GOK

The Guantanamo Review Task Force Detainee Review Guidelines ("Guidelines") (copy attached)<sup>1</sup> set forth the factors that the U.S. Government Guantanamo Review Task Force was supposed to apply to determine whether detainees should be released or transferred. The attached tables demonstrate that, based on the information available to us, the factors overwhelmingly favor transfer of both Fawzi Al Odah and Fayiz Al Kandari, the two remaining Kuwaiti citizens detained at Guantanamo.

The Guidelines state the basic criterion for transfer as follows:

**"A detainee shall be eligible for transfer if any threat he poses can be sufficiently mitigated through feasible and appropriate security measures (e.g., monitoring, restrictions on travel, and/or structured resettlement programs)." (Guidelines, p. 3)**

Given that the Government of Kuwait ("GoK") has agreed to all security conditions demanded by the U.S. Government ("USG"), the USG has approved those measures, and the two remaining Kuwaitis will commit to participate in a full rehabilitation program and to abide by security requirements even after completion of the program, they should be transferred forthwith. An examination of the specific Guideline factors supports this conclusion.

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<sup>1</sup> The Guidelines were produced by the USG pursuant to the U.S. Freedom of Information Act in a lawsuit brought by the International Council Bureau.

These materials are distributed by Pillsbury Winthrop Shaw Pittman LLP on behalf of the International Council Bureau. Additional information is on file with the U.S. Department of Justice, Washington, DC.

**“Threat Evaluation” Factors<sup>2</sup>****Fawzi Al Odah****Fayiz Al Kandari**

1. Planning or participating in specific terrorist attacks	No	No
2. Part of, or substantially supporting, Taliban or al-Qaida forces engaged in hostilities against the US	Habeas court found “more likely than not” that Fawzi was a part of enemy forces, based on hearsay evidence	Habeas court found “more likely than not” that Fayiz was a part of enemy forces, based on hearsay evidence
3. Specialized training or operational experience to plan or carry out acts of terrorism	None	Alleged but not proven
4. Ties to individual terrorists, organizations or other extremists	Fawzi acknowledged dealing with a Taliban school official when seeking a place to teach in Afghanistan for the summer; the habeas court found, based on hearsay evidence, that this person was a Taliban military trainer	Alleged but not proven
5. “Any substantial indications that the detainee intends to engage in terrorist activities or return to the battlefield upon release”	No – and will commit to rehabilitation program and security conditions upon transfer	No – and will commit to rehabilitation program and security conditions upon transfer
6. Physical and psychological condition	Excellent	Excellent
7. Detention history, including whether detainee was considered a danger to other detainees or other individuals	For many years, Fawzi fought back when he was treated like an animal by the guards, but he became compliant once conditions improved, and he was deemed eligible for transfer as recently as December 2009	No significant issues
8. “Any other relevant factors bearing on the national security and foreign policy interests of the U.S. or the interests of justice.”	GoK is prepared, able and willing to meet all previously-agreed upon USG conditions for transfer of its citizens to Kuwait. The interests of justice support transfer of men who have been imprisoned for ten years without charge or trial	GoK is prepared, able and willing to meet all previously-agreed upon USG conditions for transfer of its citizens to Kuwait. The interests of justice support transfer of men who have been imprisoned for ten years without charge or trial

<sup>2</sup> The threat evaluation factors are set forth in Part III A of the Guidelines, at pp. 3-4.

**Destination Country Factors<sup>3</sup>****Fawzi Al Odah****Fayiz Al Kandari**

1. Willingness and ability of destination country to accept transfer and impose necessary security measures	Yes	Yes
2. Extent of detainee's ties to the destination country	Strong	Strong
3. Connections with criminal or terrorist networks in destination country	None	None
4. Risk of inhumane treatment of detainee by destination country	None	None
5. Potential effects on USG relations with the destination country	Transfer would remove a significant irritant in the relationship between the USG and GoK	Transfer would remove a significant irritant in the relationship between the USG and GoK
6. Other factors showing transfer to be consistent with US foreign policy and national security interests	USG has strong foreign policy and national security interests in supporting one of its best and most faithful allies by repatriating Kuwait's citizens	USG has strong foreign policy and national security interests in supporting one of its best and most faithful allies by repatriating Kuwait's citizens

<sup>3</sup> The destination country evaluation factors are set forth in Part III B of the Guidelines, at pp. 4-5.

## **GUANTANAMO REVIEW TASK FORCE DETAINEE REVIEW GUIDELINES**

Pursuant to the Executive Order on the Review and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure of Detention Facilities, issued on January 22, 2009 ("Executive Order"), the Guantanamo Review Task Force ("Task Force") shall follow the Guidelines herein in developing its recommendations with respect to individual detainees. These Guidelines are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

### **I. Underlying Framework**

The Executive Order establishes the following framework for the review and disposition of individuals currently detained:

- First, determine with respect to each detainee whether it is possible to transfer or release the detainee consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of State and Secretary of Defense may effect the detainee's transfer or release;
- Second, with respect to any detainee not approved for transfer or release, determine whether the federal government should seek to prosecute the detainee for any offenses they may have committed, including whether it is feasible to prosecute such individuals in an Article III court;
- Third, with respect to any detainee whose disposition is not achieved through transfer, release, or prosecution, select other lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of the detainee.

Based on this framework, the first option to be considered is transfer or release. In evaluating whether transfer or release of a detainee would be consistent with the national security and foreign policy interests of the United States, Task Force review teams must work against the backdrop of the finding made in the Executive Order that closing the detention facilities at Guantanamo and resolving the prolonged detention of the individuals detained there would promote the national security and foreign policy interests of the United States. As stated in the Guantanamo Review Executive Order: "Some individuals currently detained at Guantanamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and

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<sup>1</sup> Revisions made to these Guidelines have been approved by the Guantanamo Review Panel and reflect the Guantanamo Review Task Force's practices to date.

internationally, prompt and appropriate disposition of the individuals currently detained at Guantanamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice.”

Accordingly, review teams must consider with respect to each detainee not only whether his transfer or release would pose some level of threat to national security – including whether such threat could be mitigated by security measures imposed by the destination country – but also the harm to the national security and foreign policy interests of the United States resulting from his continued detention.

The Executive Order anticipates that new diplomatic efforts may result in transfer or release of a substantial number of individuals currently detained at Guantanamo, and directs that the Secretary of State, the Secretary of Defense, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible. Consequently, every effort should be made to assess whether transfer or release is possible consistent with the national security and foreign policy interests of the United States and the interests of justice.

## **II. Review Structure**

### **A. Task Force**

The Task Force staff is grouped into two teams for purposes of conducting the detainee reviews mandated by the President’s order: (1) a transfer team and (2) a prosecution team.

The transfer team is responsible for evaluating whether detainees can be transferred or released<sup>2</sup> consistent with the national security and foreign policy interests of the United States. The transfer team shall be composed of representatives from each department and agency listed in the Executive Order.

To ensure that all relevant agency viewpoints are considered before a detainee is recommended for transfer or release, proposed transfer team recommendations shall be discussed in group deliberations that include representatives from each agency represented on the Task Force. Recommendations should be finalized only after a transfer team member from each agency has had an opportunity to express a view and voice any objections to the proposed recommendation. Dissenting views on material issues should be noted in the recommendation or otherwise made known to the Review Panel.

The prosecution team is responsible for recommending whether the government should seek to prosecute certain detainees, including whether it is feasible to prosecute the detainees in Article III courts. The prosecution team shall be staffed predominantly by federal prosecutors and investigative agents from the Department of Justice and Department of Defense.

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<sup>2</sup> The term “release” is used to mean release from confinement without the need for security measures to be imposed by the destination country. The term “transfer” is used to mean release from confinement subject to appropriate security measures in the destination country.

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Both the transfer and prosecution teams shall prepare their recommendations in consultation with the Executive Director of the Task Force (or his designee), who shall present those recommendations to the Guantanamo Review Panel ("Review Panel") on a rolling basis.

### B. Review Panel

The Review Panel consists of senior-level officials from each of the agencies listed in the Executive Order. Review Panel members have delegated authority from their respective Principals to decide the disposition of each detainee. The Review Panel meets regularly to discuss the recommendations of the Task Force and to make decisions regarding the disposition of detainees. If the Review Panel members do not reach unanimous consensus regarding a particular detainee, the case is referred for decision to a Principals Committee consisting of the Cabinet-level officials listed in the Executive Order.

Once a final decision is made regarding the disposition of a detainee, the appropriate agencies are responsible for implementing the decision. Such agencies will notify the Review Panel of any issues arising during implementation that require further interagency consideration.

### III. Recommendation for Transfer or Release

The transfer team shall conduct the following evaluations in determining whether to recommend a detainee for transfer or release.

#### A. Threat Evaluation

A detainee shall be eligible for release if he does not pose an identifiable threat to the national security of the United States. A detainee shall be eligible for transfer if any threat he poses can be sufficiently mitigated through feasible and appropriate security measures (*e.g.*, monitoring, restrictions on travel, and/or structured resettlement programs).

In evaluating the threat posed by a detainee, the transfer team shall consider the totality of available information regarding the detainee, including the factors enumerated below. In applying these factors, careful consideration must be given to the credibility and reliability of all the available information concerning the detainee. In particular, the team shall carefully scrutinize the basis for any conclusions set forth in prior threat assessments, intelligence reporting, and other information related to the detainee.

Threat factors to be considered include:

1. The extent to which the detainee was involved in or facilitated terrorist activities, including the extent to which the detainee may have planned or participated in specific terrorist attacks.<sup>3</sup>

<sup>3</sup> For example, if the detainee was not involved in planning, leading, financing, organizing, aiding, or executing acts of terrorism, or facilitating the movement or training of terrorists, the detainee may be an appropriate candidate for transfer or release, absent countervailing factors.

2. The extent to which the detainee was part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including whether the detainee committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.
3. The level of knowledge, skills, or training possessed by the detainee that has been or could be used for terrorist purposes, including the following: the training and ability to plan, lead, finance, organize, or execute acts of terrorism; the training and ability to facilitate the movement or training of terrorists; and any specialized training or operational experience (e.g., training in paramilitary tactics, explosives, or weapons of mass casualty).<sup>4</sup>
4. The nature and extent of the detainee's ties with individual terrorists, terrorist organizations, terrorist support networks, or other extremists.<sup>5</sup>
5. Any substantial indications that the detainee intends to engage in terrorist activities or return to the battlefield upon release.
6. The detainee's physical and psychological condition.
7. The detainee's detention history, including whether the detainee was considered a danger to other detainees or other individuals.
8. Any other relevant factors bearing on the national security and foreign policy interests of the United States or the interests of justice.

B. Destination Country Evaluation

Any recommendation of release or transfer shall, to the extent practicable, include a recommendation of potential destination countries. The review team may also recommend that transfer is appropriate only to specified countries or under specified conditions. In evaluating potential destination countries, the review team shall consider:

1. The willingness and ability of the destination country to accept the release or transfer and to impose any security measures needed to sufficiently mitigate any national security threat posed by the detainee.

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<sup>4</sup> For example, if the detainee has only received basic firearms training (e.g., he has been trained on how to use a standard military rifle) and has no other relevant knowledge, skills, or training, the detainee may be an appropriate candidate for transfer or release, absent countervailing factors.

<sup>5</sup> For example, if the detainee has had only passing interactions or isolated communications with known or suspected terrorists, and nothing further is known about the interactions or communications evidencing a more substantial relationship, the detainee may be an appropriate candidate for transfer or release, absent countervailing factors.

2. The extent of the detainee's ties to the destination country, including, for example, ties of citizenship, nationality, language, family, tribe, or culture, as well as any expressed desire by the detainee to be transferred to the destination country (communicated either directly or through his attorney).
3. The extent of the detainee's connections with criminal or terrorist networks in the destination country or surrounding geographical area.
4. The extent to which the detainee is at risk of inhumane treatment in the destination country, and, to the extent such risk exists, the willingness and ability of the destination country to provide appropriate assurances against such mistreatment.<sup>6</sup>
5. The potential effects that the proposed release or transfer would have on the United States' relations with the destination country and on the foreign policy interests of the United States generally.
6. Any other factors bearing on whether release or transfer to the destination country would be consistent with the foreign policy and national security interests of the United States.

The transfer team shall not recommend the release or transfer of a detainee to the United States if the release or transfer would create a threat to the safety of United States persons that could not be sufficiently mitigated by feasible and appropriate security measures imposed by the Federal Bureau of Investigation, the Department of Homeland Security, and other relevant agencies.

#### C. Legal Evaluation

The Executive Order requires review of the legal as well as the factual basis for the continued detention of each Guantanamo detainee. Accordingly, the transfer team shall evaluate whether each detainee meets the definition of the Government's detention authority set forth in the March 13, 2009 U.S. government filing in *In re: Guantanamo Bay Detainee Litigation*, Misc. No. 08-442. That filing explains that the United States bases its authority to detain individuals at Guantanamo on the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001), as informed by principles of the laws of war. The filing further explains that, pursuant to this authority:

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<sup>6</sup> The need for such assurances, and their content, will be determined on a case-by-case basis, taking into account the particular characteristics of the detainee and the destination country. However, in all cases, such assurances will include an assurance that the destination country will abide by its obligations under the Convention Against Torture and Other Cruel, Inhumane, and Degrading Treatment or Punishment, or (if the destination country is not a party thereto) a comparable commitment. No transfer shall be approved to a foreign country where the U.S. Government determines it to be more likely than not that the detainee will be tortured.



The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Any detainee falling outside this definition must be recommended for transfer or release. In any case where there is concern that a detainee does not meet this definition, such concern should be raised promptly with the Executive Director, who will consult with interested agencies.

#### **IV. Recommendation to Seek Prosecution**

The prosecution team shall consider the following guidelines in determining whether to recommend a detainee for prosecution:

- A. Cases of detainees shall be evaluated to determine whether prosecution should be recommended for any offenses the detainees may have committed, including whether it is feasible to prosecute such detainees before an Article III court.
- B. A case should be recommended for referral to the Department of Justice for further prosecutorial review if the review team concludes that the detainee's conduct constitutes a Federal offense and that the admissible evidence or potentially available admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in the review team's judgment, prosecution should be declined because no substantial Federal interest would be served by prosecution. Among the Federal interests to be considered are any benefits to be derived from prosecuting detainees before an Article III court.
- C. In an ordinary criminal case, key factors in determining whether there is a substantial interest served by prosecution are:
  - 1. Federal law enforcement priorities.
  - 2. The nature and seriousness of the offense.
  - 3. The deterrent effect of prosecution.
  - 4. The detainee's culpability in connection with the offense.
  - 5. The detainee's history with respect to criminal activity.

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6. The detainee's willingness to cooperate in the investigation or prosecution of others.
7. The probable sentence or other consequences if the person is convicted.

Given the nature of these cases, other factors will also be significant in determining whether to recommend prosecution, including:

1. The need to protect classified information, including intelligence sources and methods.
2. Any legal impediment to prosecution stemming from the past treatment of a detainee.

**V. Recommendation to Seek Other Lawful Disposition**

Considerations with respect to recommendations of other lawful disposition will be reviewed in coordination with the Task Force on Detention Policy.

**SUPPLEMENT TO GUANTANAMO REVIEW TASK FORCE  
DETAINEE REVIEW GUIDELINES**

On August 28, 2009, the Guantanamo Review Task Force completed an initial review of all detainees held at the Guantanamo Bay Naval Base. In accordance with Executive Order 13492, the purpose of the initial review was to identify on a rolling basis and as promptly as possible those detainees that can be transferred or released consistent with the national security and foreign policy interests of the United States, as well as those detainees that should and can be prosecuted by the Federal Government. As a result of this initial review, 92 detainees were approved for transfer and 40 detainees were referred to the Department of Justice for possible prosecution.<sup>1</sup>

During the initial review, recommendations or decisions regarding the disposition of the remaining detainees were deferred pending further evaluation in a second phase review to determine whether the detainees should be designated for continued detention under the laws of war. As the President has stated, there may be a number of detainees who are too dangerous to release and who cannot be prosecuted in any forum. Subject to further policy decisions by the Administration, such detainees may continue to be held in a law of war detention status, but only if they meet the legal standard for continued detention under the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001), as informed by the principles of the laws of war. In addition, continued detention without criminal charges is an option under the review framework set forth in the Executive Order only where transfer, release, or prosecution is not possible consistent with national security and foreign policy interests and the interest of justice, and thus continued law of war detention should be selected only where necessary and appropriate. Accordingly, the purpose of the second phase review is to reevaluate the remaining detainees to determine whether they are appropriate for continued law of war detention—including whether they meet the legal standard for such detention—or whether upon further review they are deemed appropriate for transfer, release, or prosecution.

This supplement to the Guantanamo Review Task Force Detainee Review Guidelines ("Guidelines") sets forth the process for the second phase review, as agreed to by the Guantanamo Review Panel. These supplemental guidelines are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

**Second Phase Review: Evaluation for Continued Law of War Detention**

The Task Force's second phase review will be conducted by a review team composed of representatives from each department and agency listed in the Executive Order, as well as prosecutors from the Department of Justice who will work in

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<sup>1</sup> As of September 23, 2009, an additional four detainees recommended by the Task Force for transfer during the initial review remained pending before the Review Panel.

consultation with prosecutors from the Department of Defense. To the extent possible, the team should be composed primarily of individuals who have experience reviewing a broad range of detainees as part of their work on the Task Force's transfer or prosecution review teams.

In preparing their recommendations, the review team shall complete a threat evaluation, prosecution evaluation, and legal evaluation for each detainee, as described below. In accordance with the framework established by the Executive Order, every effort shall be made to ensure that all detainees who can be recommended for transfer, release, or prosecution consistent with national security and foreign policy interests and the interest of justice are recommended for such dispositions following this second phase review. A detainee should be considered eligible for continued law of war detention only if (1) the detainee poses a national security threat that cannot be sufficiently mitigated through feasible and appropriate security measures; (2) prosecution of the detainee by the Federal Government is not feasible in any forum; and (3) continued law of war detention is lawful.

As set forth in the Guidelines, the review team shall consider not only the risk that could be posed by the transfer or release of the detainee, but also the harm to the national security and foreign policy interests of the United States that could result from the continued detention of the detainee without criminal charges.

Recommendations for continued law of war detention shall identify any foreseeable contingencies that could warrant a change in the detainee's status at some point in the future. For example, a recommendation for continued law of war detention shall note whether a detainee is considered too dangerous to transfer or release only because security conditions in his home country are currently inadequate to mitigate the detainee's threat and resettlement is not an option (in which case, the team should recommend that the Review Panel or any successor entity revisit the possibility of transfer in the event that security conditions in the detainee's home country improve or a resettlement option becomes available). Likewise, a recommendation for continued law of war detention shall note whether there is a reasonable possibility that certain evidence or witnesses could develop that might make it feasible either to transfer or to prosecute the detainee at some point in the future.

#### **A. Threat Evaluation**

In conducting the threat evaluation, the review team shall follow the same standards and factors used by the transfer team during the initial review, as set forth in the Guidelines. The review team shall reexamine the Task Force's initial assessment of each detainee and seek to resolve any open questions from the deliberations of the Task Force or Review Panel. In particular, the team shall examine each detainee in light of experience gained and other transfer decisions made over the course of the initial review, to ensure that consistent standards are applied for all detainees.

In appropriate cases, before recommending a detainee for continued law of war detention, representatives from the Task Force may meet with the detainee's counsel in order to provide counsel an opportunity to present any additional information not already received regarding the appropriate disposition for the detainee and to provide an outside perspective on the Task Force's fact-finding process. The Task Force will consult closely with the Department of Justice in arranging any such meetings.

## **B. Prosecution Evaluation**

The prosecution evaluation in the initial review was focused primarily on the feasibility of prosecution in an Article III court. Each detainee subject to this second phase review shall be assessed for feasibility of prosecution in both an Article III court and the military commission system. This evaluation shall be conducted by the prosecutors on the review team in close consultation with the Office of Military Commissions ("OMC").

In particular, the prosecutors on the review team shall consult closely with OMC concerning any case previously designated for prosecution by OMC, in order to determine where the OMC investigation stands and whether a military commission prosecution appears feasible based on the currently available evidence. The prosecutors on the review team should also consult with OMC concerning any cases that have not been previously designated for military commission prosecution but that the Task Force considers potentially feasible for such prosecution.

As in the initial review, any detainees deemed potentially feasible for Article III prosecution (including detainees also deemed potentially feasible for military commission prosecution) shall be recommended for referral to the Department of Justice for further prosecutorial review and charging decisions pursuant to the protocol adopted by the Department of Justice and Department of Defense for handling such referrals.

Any detainees deemed potentially feasible for prosecution in a military commission but not feasible for prosecution in an Article III court shall be recommended for referral directly to OMC.

## **C. Legal Evaluation**

It is critical that any detainee recommended for continued law of war detention meet the legal standard for the Government's detention authority. As explained in the Government's filing on March 13, 2009 in *In re: Guantanamo Bay Detainee Litigation*, Misc. No. 08-442, the Government has set forth the following definitional framework for its detention authority, which is based on the AUMF as informed by the principles of war:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of,

or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

The review team shall work closely with the Department of Justice in obtaining a legal assessment for each detainee considered for continued law of war detention. This assessment shall address both the question of whether the detainee meets this legal standard for continued detention and the strength of the detainee's *habeas* case. The assessment shall be included in the Task Force's recommendation in order to inform the Review Panel's consideration of the appropriate disposition for the detainee.

A related interagency process coordinated by the Department of Justice has been charged with making Executive Branch determinations regarding the lawfulness of the detention of particular Guantanamo detainees and the Government's position in certain *habeas* cases. Any decision by the Review Panel regarding the continued detention of a detainee without criminal charges will be subject to determinations arising from this related interagency process.

**GUANTANAMO REVIEW TASK FORCE  
DETAINEE REVIEW GUIDELINES**

Pursuant to the Executive Order on the Review and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure of Detention Facilities, issued on January 22, 2009 ("Executive Order"), the Guantanamo Review Task Force ("Task Force") shall follow the Guidelines herein in developing its recommendations with respect to individual detainees. These Guidelines are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

**I. Underlying Framework**

The Executive Order establishes the following framework for the review and disposition of individuals currently detained:

- First, determine with respect to each detainee whether it is possible to transfer or release the detainee consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of State and Secretary of Defense may effect the detainee's transfer or release;
- Second, with respect to any detainee not approved for transfer or release, determine whether the federal government should seek to prosecute the detainee for any offenses they may have committed, including whether it is feasible to prosecute such individuals in an Article III court;
- Third, with respect to any detainee whose disposition is not achieved through transfer, release, or prosecution, select other lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of the detainee.

Based on this framework, the first option to be considered is transfer or release. In evaluating whether transfer or release of a detainee would be consistent with the national security and foreign policy interests of the United States, Task Force review teams must work against the backdrop of the finding made in the Executive Order that closing the detention facilities at Guantanamo and resolving the prolonged detention of the individuals detained there would promote the national security and foreign policy interests of the United States. As stated in the Guantanamo Review Executive Order: "Some individuals currently detained at Guantanamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantanamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice." Accordingly, review teams must consider with respect to each detainee not only whether his transfer or release would pose some level of threat to national security – including whether such threat could be mitigated by security measures imposed by the destination country – but also the

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harm to the national security and foreign policy interests of the United States resulting from his continued detention.

The Executive Order anticipates that new diplomatic efforts may result in transfer or release of a substantial number of individuals currently detained at Guantanamo, and directs that the Secretary of State, the Secretary of Defense, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible. Consequently, every effort should be made to assess whether transfer or release is possible consistent with the national security and foreign policy interests of the United States and the interests of justice.

## II. Recommendation for Transfer or Release<sup>1</sup>

### A. Threat Evaluation

A detainee shall be eligible for release to a foreign country or the United States if he does not pose an identifiable threat to the national security of the United States. A detainee shall be eligible for transfer to a foreign country or to the United States if any threat he poses can be sufficiently mitigated through feasible and appropriate security measures (e.g., monitoring, restrictions on travel, and/or structured resettlement programs).<sup>2</sup>

In evaluating the threat posed by a detainee, a review team shall consider the totality of available information regarding the detainee, including the factors enumerated below. In applying these factors, careful consideration must be given to the credibility and reliability of all the available information concerning the detainee. In particular, the review team shall carefully scrutinize the basis for any conclusions set forth in prior threat assessments, intelligence reporting, and other information related to the detainee.

Threat factors to be considered include:

1. The extent to which the detainee was involved in or facilitated terrorist activities against the United States or its partners or allies, including the extent to which the detainee may have planned or participated in specific attacks directed against United States persons or targets or those of its partners or allies. If the detainee was not substantially involved in planning, leading, financing, organizing, or executing acts of terrorism, or facilitating the movement or training of terrorists, the detainee should generally be deemed eligible for transfer or release, absent countervailing factors.

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<sup>1</sup> The term "release" is used to mean release from confinement without the need for security measures to be imposed by the destination country. The term "transfer" is used to mean release from confinement subject to appropriate security measures in the destination country.

<sup>2</sup> Where a detainee has been ordered transferred or released by a court, and the Government has exhausted its appeal rights or decided not to contest the order, the detainee shall be presumed eligible for transfer or release by the Task Force. However, the Task Force shall nonetheless conduct a threat evaluation for purposes of determining what security measures are needed to mitigate any threat posed by the detainee.



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2. The level of knowledge, skills, or training possessed by the detainee that has been or could be used for terrorist purposes, including the following: the training and ability to plan, lead, finance, organize, or execute acts of terrorism; the training and ability to facilitate the movement or training of terrorists; and any specialized training or operational experience (e.g., training in paramilitary tactics, explosives, or weapons of mass casualty). If the detainee has only received basic firearms training (e.g., he has been trained on how to use a standard military rifle) and has no other relevant knowledge, skills, or training, the detainee should generally be deemed eligible for transfer or release, absent countervailing factors.
3. The nature and extent of the detainee's ties with individual terrorists, terrorist organizations, terrorist support networks, or other extremists hostile to the United States or its partners or allies. If the detainee has had only passing interactions or isolated communications with known or suspected terrorists, and nothing further is known about the interactions or communications evidencing a more substantial relationship, the detainee should generally be deemed eligible for transfer or release, absent countervailing factors.
4. Any substantial indications that the detainee intends to engage in terrorist activities or return to the battlefield upon release.
5. The detainee's physical and psychological condition.
6. The detainee's detention history, including whether the detainee was considered a danger to other detainees or other individuals.
7. Any other relevant factors bearing on the national security and foreign policy interests of the United States or the interests of justice.

B. Destination Country Evaluation

Any recommendation of release or transfer shall, to the extent practicable, include a recommendation of potential destination countries, which may include the United States. In evaluating potential destination countries, the review team shall consider:

1. The willingness and ability of the destination country to accept the release or transfer and to impose any security measures needed to sufficiently mitigate any national security threat posed by the detainee.
2. The extent of the detainee's ties to the destination country, including, for example, ties of citizenship, nationality, language, family, tribe, or culture, as well as any expressed desire by the detainee to be transferred to the destination country (communicated either directly or through his attorney).

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3. The extent of the detainee's connections with criminal or terrorist networks in the destination country or surrounding geographical area.
4. The extent to which the detainee is at risk of inhumane treatment in the destination country, and, to the extent such risk exists, the willingness and ability of the destination country to provide appropriate assurances against such mistreatment.<sup>3</sup>
5. The potential effects that the proposed release or transfer would have on the United States' relations with the destination country and on the foreign policy interests of the United States generally.
6. Any other factors bearing on whether release or transfer to the destination country would be consistent with the foreign policy and national security interests of the United States and the interests of justice.

The review team shall not recommend the release or transfer of a detainee to the United States if the release or transfer would create a substantial threat to the safety of United States persons that could not be sufficiently mitigated by feasible and appropriate security measures imposed by the Federal Bureau of Investigation, the Department of Homeland Security, and other relevant agencies.

C. Legal Evaluation

The Executive Order requires review of the legal as well as the factual basis for the continued detention of each Guantanamo detainee. Accordingly, review teams shall evaluate whether each detainee meets the definition of the Government's detention authority set forth in the March 13, 2009 U.S. government filing in *In re: Guantanamo Bay Detainee Litigation*, Misc. No. 08-442. That filing explains that the United States bases its authority to detain individuals at Guantanamo on the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001), as informed by principles of the laws of war. The filing further explains that, pursuant to this authority:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has

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<sup>3</sup> The need for such assurances, and their content, will be determined on a case-by-case basis, taking into account the particular characteristics of the detainee and the destination country. However, in all cases, such assurances will include an assurance that the destination country will abide by its obligations under the Convention Against Torture and Other Cruel, Inhumane, and Degrading Treatment or Punishment, or (if the destination country is not a party thereto) a comparable commitment. No transfer shall be approved to a foreign country where the U.S. Government determines it to be more likely than not that the detainee will be tortured.

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committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Any detainee falling outside this definition must be recommended for transfer or release. In any case where there is concern that a detainee does not meet this definition, such concern should be raised promptly with the Executive Director, who will consult with interested agencies.

**III. Recommendation to Seek Prosecution**

- A. Cases of detainees shall be evaluated to determine whether prosecution should be recommended for any offenses the detainees may have committed, including whether it is feasible to prosecute such detainees before an Article III court.
- B. A case should be recommended for Federal prosecution if the review team concludes that the detainee's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in the review team's judgment, prosecution should be declined because no substantial Federal interest would be served by prosecution. Among the Federal interests to be considered are any benefits to be derived from prosecuting detainees before an Article III court.
- C. In an ordinary criminal case, key factors in determining whether there is a substantial interest served by prosecution are:
  - 1. Federal law enforcement priorities.
  - 2. The nature and seriousness of the offense.
  - 3. The deterrent effect of prosecution.
  - 4. The detainee's culpability in connection with the offense.
  - 5. The detainee's history with respect to criminal activity.
  - 6. The detainee's willingness to cooperate in the investigation or prosecution of others.
  - 7. The probable sentence or other consequences if the person is convicted.

Given the nature of these cases, other factors will also be significant in determining whether to recommend prosecution, including:

- 1. The need to protect classified information, including intelligence sources and methods.

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2. Any legal impediment to prosecution stemming from the past treatment of a detainee.

**IV. Recommendation to Seek Other Lawful Disposition**

Considerations with respect to recommendations of other lawful disposition will be reviewed in coordination with the Task Force on Detention Policy.